United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-2072

In the

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 76-2072

EDWARD MALLEY, JR.,
Petitioner - Appellee

vs.

JOHN MANSON, COMMISSIONER
OF CORRECTION,
Respondent - Appellant.

Respondent's Appeal from a Judgment of The United States District Court for the District of Connecticut.

JOINT APPENDIX

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INDEX TO RECORD ON APPEAL

VOLUME II

DOCKET ENTRIES

Date

1974

12-31 Petition for a writ of habeas corpus filed. Motion and affidavit for permission to proceed in forma pauperis granted, Blumenfeld, J. ml/2/75. Order Blumenfeld, J. ml/2/75. Attested copies of Order and motion to proceed in forma pauperis and copies of writ handed to Marshal for service.

1975

1-3 Hearing on Motion to Release of petitioner upon filing of Bond. Motion Granted, with consent of State's Atty. for N.H. County. Order executed by M.J.B. re; Bond. Atty. Clifford to prepare necessary lien on property and provide Clerk's office with receipt of Filing thereof in favor of U. S. Gov't. Order to Issue upon such action by Atty. Clifford.

1-6 Body writ issued and 2 attested copies handed to Malley.

1-7 Bond in the sum of $15,000. with property surety of Edward and Alice Malley. Blumenfeld, J. ml-7. Copies given to suretys, Marshal and Atty. Sturdevant.

1-9 Marshal's return showing service.

1-9 Return of Body writ showing executed by delivery petitioner to U. S. District Court.

1-16 Appearance of Jerrold H. Barnett entered for the respondents.

1-16 Motion for Enlargement of Time in which to file return.

1-21 Motion #6 enlarging time until 1/31/75 is granted, MJB m 1-23-75. Copies mailed.

1-24 Court Reporter's Notes of Proceedings held on January 3, 1975, filed in Hartford. (Collard, R.)

2-14 Motion for Extension of Time until 2/20/75, Granted, MJB, m 2-14-75. Copies mailed to counsel, and petitioner.

2-21 Respondents' Return with Exhibits 1 thru 8.

6-23 Memorandum of Law in support of writ of habeas corpus.

7-25 Motion for Enlargement of Time within which to file brief until Sept. 15.

7-30 Extension of Time granted. Blumenfeld, J. m7-30-75. Copies mailed.

9-15 Motion for Enlargement of Time within which to file until 9/26/75. Ordered Accordingly, Markowski, C. m9-16-75. Copies mailed.

9-26 Motion for Enlargement of Time within which to file brief until 10-3-75. Ordered Accordingly, Markowski, C. m9-29-75. Copies mailed.

10-6 Respondents' Memorandum of Law in Opposition to the Issuance of A Writ of Habeas Corpus.

1976

6-15 Memorandum of Decision, Blumenfeld, J. m 6-15-76. Copies to counsel. (petition will be granted unless the State elects to vacate the conviction and retry him within 60 days)

6-18 Judgment entered. Markowski, C. m6-18-76. Copies to counsel. Blumenfeld, J.

7-8 Appearance of Francis F. McDonald & Walter Scanlon entered for the def.

7-8 Motion of Appeal filed by def. Copies of notice mailed to counsel. Certified copies of notice and certified copy of docket entries mailed to U. S. Court of Appeals in New Haven. Appeals Management Plan and Forms C & D mailed to Atty. McDonald.

7-9 Request for Stay of Order Pending Appeal filed by def.

7-14 Endorsement on motion #18 Stay requested is granted subject to the condition that the respondents comply with all of the time requirements in pursuit of its appeal to the Court of Appeals, Blumenfeld, J. m7-14-76. Copies to counsel.

TRANSCRIPT OF TRIAL TESTIMONY

(Tr. 41)

JOHN GRIFFIN after being first duly sworn, testified as follows:

THE COURT: Where do you live?

THE WITNESS: Sylvan Avenue in Waterbury.

DIRECT EXAMINATION BY MR. McDONALD:

Q: Lt. Griffin, are you with the Special Service Squad?

A: Yes, I am.

Q: What's your position with the Special Service Squad?

A: Lt. in charge of Special Service Division.

Q: And as such, what are your duties?

A: We investigate narcotics, gambling, vice.

Q: Now, what is the majority of your time spent on investigating?

A: Narcotics.

Q: What percentage?

A: Over 90%.

MR. MELLON: Your Honor, I'll object. It's not relevant.

THE COURT: I'll let the answer stand. Overruled.

MR. MELLON: May an exception be noted.

THE COURT: Noted.

Q: Are you familiar with controlled drugs, such as LSD?

A: Yes, I am.

Q: And have you conducted investigations in the past with respect to LSD?

(Tr. 42)

A: Yes, I have.

Q: And do you know Officer Laviana?

A: Yes, I do.

Q: And what's his relationship with the Special Service Squad?

A: He's an undercover agent for the Special Service Squad.

Q: And has he been operating as an undercover agent for some time?

A: Yes, he has.

Q: And how about Officer Stabler?

A: Yes, sir.

Q: Do you know him?

A: Yes, sir.

Q: Is he also an undercover officer?

A: He is.

Q: And do they more or less work as a team?

A: Yes, they do.

Q: Stabler and Laviana?

A: Yes, sir.

Q: Now, on August 21, 1970, did you have occasion to receive anything from Officer Laviana?

A: Yes, I did.

Q: And what was it that you received?

A: Seven LSD tabs.

Q: And what if anything did you do with those tabs?

(Tr. 44)

* * * * * *

Q: And what if anything did you do with these pills after placing them in the safe?

A: The following day they were delivered to Hartford. I believe it was the following day they were delivered by Detective DiLegge.

Q: By Detective DiLegge?

A: That's correct.

Q: Either the following day or some day thereafter?

A: That's correct.

Q: And they were sent there for a toxicological examination?

A: That's correct. They were in the safe until the time of delivery. What the day was I'm not sure.

Q: Whether there were many more days passed, you're not sure?

A: I'm not positive.

Q: Now, have Officers Stabler and Laviana been regularly making special purchases of controlled drugs and narcotics for the Special Service Squad?

A: Yes.

Q: And reporting the results of their investigations to you?

MR. MELLON: I'll object to that.

THE COURT: There's no conversation.

(Tr. 45)

MR. MELLON: Let the question go.

THE COURT: The question may be answered.

A: Yes, they are.

Q: And have many arrests and seizures of narcotics resulted?

A: Yes, sir.

Q: From their activities?

A: Yes, sir.

Q: Are they presently engaged in those activities for your squad?

A: Yes, they are.

MR. McDONALD: Nothing further.

CROSS EXAMINATION BY MR. MELLON:

Q: Lieutenant, in this particular incident, did you have an occasion to fill out an affidavit?

A: We made out an affidavit, yes.

Q: I'll show you a copy. Would you read that carefully?

A: Yes, that's my signature on it, yes.

Q: Well, would you read the statement carefully? (Pause)

A: Yes.

Q: And that's your signature?

A: That's right.

Q: And do you recall when this affidavit - -

MR. MELLON: I'm sorry, your Honor, may this be -- do you have any objection?

MR. McDONALD: No objection.

THE COURT: All right. Affidavit of Lt. Griffin.

(Tr. 57)

* * * * * *

CROSS EXAMINATION BY MR. MELLON:

Q: Lt. Griffin, Defendant's Exhibit 1. To the best of your knowledge, when was the first time you saw that statement?

A: To the best of my knowledge?

Q: Uh huh.

A: It could have been -- it's hard to say. Within a day or so, I'd say.

Q: Within a day or so?

A: I'd say so, yes.

Q: Do you know where that statement has been since that day?

A: Yes.

Q: Where?

A: In our office.

Q: It's been in your office?

A: That's correct.

Q: And when these undercover officers report, do they report directly to the Police Station?

A: No, sir.

* * * * * *

REDIRECT EXAMINATION:

(Tr. 59)

A: Well, as far as coming into the Police Department?

Q: Yes.

A: No, no. They don't come in on a daily basis, no, sir.

Q: Is there a reason for that?

A: Yes, sir.

Q: What's the reason?

A: So they won't be compromised, people see them coming in and going out of there.

Q: They're testifying in this trial, aren't they; Officer Laviana has already testified, hasn't he?

A: Yes, sir.

MR. McDONALD: Nothing further.

(Recess)

MR. McDONALD: I call Mr. Staebler.

EXCERPT FROM TRANSCRIPT OF JUDGE'S CHARGE

(Tr. 292)

You are the sole judges of the facts, the sole judges of whether or not they are sufficient to demonstrate the guilt of this accused or whether they do demonstrate his innocence.

The opinions of either counsel as stated to you in their arguments are in no way binding upon you in your determination of the facts, although you should weigh the arguments of the attorneys as to the facts. It is your recollection of the evidence that controls, not mine, or not that of the attorneys, but your recollection controls.

EXCERPT FROM SUPREME COURT OF CONNECTICUT ARGUMENT OF DEFENSE COUNSEL

I.

THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED BY THE DIRECT EXAMINATION, CROSS-EXAMINATION AND SUMMATION OF THE PROSECUTOR INSOFAR AS MATTERS NOT RELEVANT OR MATERIAL TO THE PROSECUTION AND WHOLLY OUTSIDE THE RECORD WERE BROUGHT TO THE JURY'S ATTENTION.

A. The Prosecutor's Reference to the Loss of Two Undercover Agents Was an Adverse Comment on Defendant's Absolute Right to a Trial.

The Federal and State constitutions imbue a defendant with certain safeguards and rights in a criminal prosecution. Among those rights under the Fifth and Sixth Amendments of the United States Constitution are the privilege against self-incrimination, the right not to be subjected to double jeojardy and the right to due process of law. Similarly, under Article I, Section 8 of the Connecticut Constitution of 1965, an accused in a criminal prosecution has a right to be heard by himself and by counsel; he has a right not to be compelled to give evidence against himself and a right not to be deprived of liberty without due process of law. Moreover, he has a right to a public trial by an impartial jury.

A corollary of those rights is that an accused has absolutely no obligation whatsoever to plea bargain with the state, to plead guilty or to waive the trial to which he is constitutionally entitled.

The courts have long recognized that prosecutors may not impinge upon constitutionally protected rights by the conduct during the course of the trial. Where the prosecutor's action have impinged upon such rights, the courts have not hesitated to reverse convictions. For

example, any comment by a prosecutor referring to the fact that a defendant did not testify in his own behalf is objectionable and prejudicial as a matter of law. The Supreme Court has held in **Griffin v. California**, 380 U.S. 609, 85 S. Ct. 1229, reh. den. 381 U.S. 957, 85 S. Ct. 1797, that the self-incrimination guarantee of the Fifth Amendment and its bearing on the states by reason of the Fourteenth Amendment, forbids either comment by the prosecution on an accused silence or instructions by the court that such silence is evidence of guilt. That rule has been applied in Connecticut to require reversal of a conviction even in the absence of timely objection to prescribe comment at the trial. In **State v. Chasse**, 230 A. 2d 51, 4 Conn. Cir. 276 (Conn. Cir. A.D. 1967), the appellate division reversed a conviction for just that reason, stating "no exception is necessary to preserve appellate review of a deprivation of a fundamental constitutional right, in the absence of an exception becomes immaterial." See **State v. Vars**, 154 Conn. 255, 270, 224 A. 2d. 744; **State v. Wilkas**, 154 Conn. 407, 409; 225 A. 2d 821.

In reviewing the conduct of a prosecutor, it is important to bear in mind that all courts have recognized that the public prosecutor is not an ordinary advocate. His duty is not to secure convictions, but to see that justice is done and to refrain from improper methods calculated to produce prejudicial and wrongful decisions on the part of the jury. Cf. **United States v. Nettle**, 121 F. 2d 927 (3 Cir. 1941); **United States v. Kravitz**, 281 F. 2d 581 (3 Cir. 1960) (a public prosecutor in a criminal case has an even greater responsibility in counsel for individual clime and must exercise that responsibility with circumspection and dignity which the occasion calls for and must rest his case on evidence, not epithet).

This Court also has pointed out that a prosecutor should never be allowed to use his summation as a license stayed or comment upon or suggest an inference from facts not in evidence or to present matters which

the jury has no right to consider. **State v. Ferrone**, 96 Conn. 160, 113 A. 452. (1921). Nevertheless, the prosecutor made constant attempts to inflame and prejudice the jury with irrelevant and immaterial matter.

We believe that the cited cases apply, with full force, to this situation where the prosecutor's inflammatory remarks unsupported by the record, amounted to an attack on the defendant's exercise of his right to trial by jury and his right to confrontation.

The findings reflect (R. 38, F. 158) that during his summation, the prosecutor advised the jury as to the effect of having called the undercover agents to the stand as follows:

> "The police officers have testified here before you. They have blown their cover. They come in here and identify before you, two excellent trained investigators, undercover men who, you heard their testimony, purchased over a hundred various items of heroin, L.S.D. and other controlled drugs. They have come in and we have lost them as undercover men due to this case, but we put them on here as witnesses before you, because this L.S.D. problem and the sale of it is such a serious offense." . . .
>
> "They go around with a beard and attempt to buy these drugs, and they succeeded. But something went wrong with Mr. Malley this time because these men came into Court **and testified before you**, ladies and gentlemen of jury." . . .
>
> "Now with respect to this drug scene, there are few people fighting it and a few of them are the two that testified here. There aren't many others, and we have lost them due to this trial." (emphasis added)

Those comments were totally gratuitous. They were unsupported by the record and indeed we do not even know if they were or are true. Certainly, there is no evidence and nothing to indicate that the undercover agents were prohibited from working in other geographic areas as undercover agents. Nor was there any evidence which would indicate that this trial was publicized to the extent that the disclosure of the undercover agents' names would have a lasting effect on their ability to purchase drugs. Thus, the forceful argument of the prosecutor could only have had the effect of prejudicing the jury against the defendant for exercising his right to trial by jury, to confrontation, and to testify.

Moreover, the prosecutor's account as to why the investigators were put on the stand is totally misleading. He stated, "they have come in and we have lost them as undercover men **due to this case**, (emphasis added) but we have put them on here as witnesses before you because this LSD problem and the sale of it is such a serious offense. . . ." (F. 158)

The investigators were brought in because defendant had an absolute right to be confronted with his accusers. They were not brought in because of the LSD problem and the sale of it is such a serious offense. That latter comment could only inflame the jury against the defendant and help resolve the credibility differences against the defendant.

Moreover, there was no support anywhere that there aren't many other undercover investigators. The comment that the State lost them, **due to this trial**, clearly is an attempt to penalize defendant for exercising his constitutional rights.

As such, it is no different from adverse comments on those defendants who exercise their right to remain silent and who are protected from such conduct. If anything, the impingement on the right to go to trial

and to testify is more absolute and requires greater safeguard than the lesser right merely to remain silent.

We believe this error alone is sufficient to constitute the basis for reversing this conviction. But the prosecutor introduced throughout the trial, and in his summation, other inflammatory material.

B. The Prosecutor Prejudiced the Jury By Constant References to the Seriousness of the LSD Problem.

On direct examination, he asked officer Laviana if he had seen people under the influence of LSD and had seen the effect it had on their lives. The officer answered that he had. (R. 33 F. 153). The court found the objection made to the line of questioning not to be timely. (R. 34). Moreover, despite the court's sustaining an objection during the redirect examination of officer Stabler, (R. 35) through a similar line of questioning, the prosecutor persisted. He continued to ask whether or not the officer was familiar with the effect of drugs like LSD had on families of people that used it. Strangely, the court overruled trial counsel's objection to this line of questioning. (R. 34-35). In this there was error. Assignment of errors, 2). When the court finally sustained the objection, it did not strike from the record the references to the effects on the families.

Similarly, during the cross examination of the defendant, the prosecutor attempted to conject into the record the same extraneous material. He asked the defendant whether he knew LSD was a dangerous drug, whether he knew it could cause permanent damage to people that use it, whether he knew people had good trips and bad trips on it, whether people can go off who used it and whether, in fact, the defendant "knew it is deadly stuff". (R. 36-37). The prosecutor amplified this improper line of questioning in his summation when he argued to the jury, as we have pointed out before, of the necessity for undercover agents, of the fact that LSD was a serious problem. Moreover, he stated:

> "This question of the use of psychedelic hallucigenic drugs has inflamed our country and has put many of us asking questions about the use of this drug by our younger people.
>
> We often hear the expression the Drug Scene. And when we think of the Drug Scene, we think of what we see on television, what we hear about, the group in Greenwich Village, young people dressed in hippie style using marijuana, LSD, speed and some of these other drugs who turn on. But that is not the Drug Scene as we see it."

The references to the seriousness of an LSD offense and the effect on the families of LSD users were clearly not supported in the record and had no business in the record. Nor do we even know if there exists a scientific basis for the hypothesis. It could only be designed in violation of the prosecutor's duty to secure justice to prejudice the jury against crediting the defendant's alibi.

In a remarkably similar case, the Supreme Court of the State of Alabama reversed a conviction on the basis of prosecutorial comments similar to those here. **Racine v. State**, 290 Ala. 225, 275 So. 2d 655 (1973). There, the prosecutor stated that the defendant would sell LSD to children, and made many comments about the harmfulness of LSD. The court found the summation prejudicial, particularly in light of its reference to children. There was no support for the statement in the record and the conviction was reversed. See also **State v. Sheeler**, 300 S.W. 318 (Mo. Ap. 1927) where the conviction was reversed for prosecutor's statement urging the jury not to permit the government to be run by Italian bootleggers.

Thus, the clear abuse by the prosecutor in his summation in referring to matters outside the records and matters not properly within the scope of the prosecution, constitute a basis for reversal of this conviction and amounted to denial of the fair and impartial trial to which the defendant was entitled.

DECISION

SUPREME COURT
October Term, 1974

STATE OF CONNECTICUT
vs.
EDWARD MALLEY, JR.

Information in three counts charging the defendant with the crimes of possession of a controlled drug and of selling a controlled drug, brought to the Superior Court in the judicial district of Waterbury and tried to the jury before **Healey, J.**; verdict and judgment of guilty of one count of possession and one count of selling a controlled drug, and appeal by the defendant. **No error.**

J. Daniel Sagarin, for the appellant (defendant).
Walter H. Scanlon, assistant state's attorney, with whom, on the brief, was **Francis M. McDonald**, state's attorney, for the appellee (state).

HOUSE, C. J. The defendant was charged in a three-count information with possession and sale of a controlled substance, LSD, in violation of §§19-481 (b) and 19-480 (b) of the General Statutes. After a trial by jury, he was found guilty on the first two counts of the information and, by direction of the court, not guilty on the third count.

On his appeal to this court the defendant has been represented by counsel other than the attorney who represented him during the trial. He filed seven assignments of error. Two of them were expressly abandoned on appeal. The remaining assignments claim error in the court's denial of the defendant's motion to set aside the verdict, in the court's charge to the jury, and "[i]n allowing, refusing to strike and/or failing to give cau-

tionary instructions as to the testimony elicited by the prosecutor and the arguments of the prosecutor."

With respect to the court's denial of the defendant's motion to set aside the verdict, it is the defendant's claim that the court erred because, he asserts, the verdict was "contrary to law and was against the weight of the evidence because the conflicting evidence offered by the state was not sufficient to support a verdict and because testimony as a whole was not sufficient to support a verdict." Whether the evidence supports a verdict is tested by the summary of the evidence as printed in the appendices to the brief. **State v. Coleman**, Conn. (36 Conn. L.J., No. 17, p. 1); **State v. Siberon**, Conn. (35 Conn. L.J., No. 51, p. 1). From this source, it appears that there was evidence from which the jury could find the following facts: On August 21, 1970, Robert Laviana and Richard Staebler, members of the Central Naugatuck Valley Regional Narcotics Squad were working as undercover agents in Waterbury. The two officers were approached by the defendant who offered to sell them some LSD. The officers drove to a prearranged meeting place where they met the defendant and purchased the drugs which, upon analysis by the state toxicologist, proved to be LSD, a hallucinogenic drug. The defendant denied that he had made any sale to the officers and testified to his presence elsewhere at the time the officers testified they purchased the drugs from him. He offered the testimony of two witnesses to support his alibi. The issue, therefore, resolved itself into one of credibility to be determined by the jury as the trier of fact; **State v. White**, 155 Conn. 122, 123, 230 A.2d 18; **State v. Hodge**, 153 Conn. 564, 572, 219 A.2d 367; and the evidence must be given a construction most favorable to sustaining the jury's verdict. **State v. Benton**, 161 Conn. 404, 409, 288 A.2d 411. There is ample evidence summarized in the appendix to the state's brief to support the verdict of the jury; and we find no error in the ruling of the trial court denying the defendant's motion to set aside the verdict.

The defendant assigned error in the court's charge to the jury on the weight to be given to the testimony of alibi witnesses. The charge was in substance the same as that approved by this court in **State v. Cari**, 163 Conn. 174, 181-82, 303 A.2d 7, in which case we discussed the discretion of the trial court to make fair comments on the evidence and particularly charge on the credibility of witnesses generally and alibi witnesses in particular. It is well settled that a charge to the jury is to be judged in its entirety and error cannot be predicated on detached sentences or portions of the charge. **State v. Raffone**, 161 Conn. 117, 127, 285 A.2d 323; **State v. Tropiano**, 158 Conn. 412, 433, 262 A.2d 147, cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288. The defendant now claims that the court should not have given the portion of the standard alibi charge which cautions the jury that frequently evidence concerning a claimed alibi will consist, in part at least, of testimony of witnesses who may be friends or associates of the accused and who may, therefore, be held to be in a greater or lesser degree interested. This portion of the standard charge was not pertinent in the circumstances of this case since there was no evidence that the alibi witnesses were in fact friends or associates of the defendant. We cannot, however, conclude that it is reasonably probable that this inadvertent observation would have misled the jury. See **Cackowski v. Jack A. Halprin, Inc.**, 132 Conn. 67, 71, 42 A.2d 838; **McMahon v. Bryant Electric Co.**, 121 Conn. 397, 406, 185 A. 181. The remainder of the charge concerning alibi witnesses was pertinent and correct, defense counsel pointed out in his argument to the jury that both alibi witnesses "had no interest in this case" and, of controlling importance on appeal, the defendant made no request to

charge and took no exception to the charge as required by § 249 of the Practice Book as amended.[1] As we reiterated in **State v. Van Valkenburg**, 160 Conn. 171, 174, 276 A.2d 888: "The requirement that either a request to charge be made or an exception be taken if a portion of the charge is to be assigned as error merely implements the fundamental rule that we do not attempt to review on appeal a question which was never raised in or passed on by the trial court. Our practice 'does not permit a defendant in a criminal case to fail, whether from a mistake of law, inattention or design, to object to matters occurring during a trial until it is too late for them to be corrected or even considered and then, if the outcome proves unsatisfactory, to raise them for the first time on an appeal.' **State v. Taylor**, 153 Conn. 72, 86, 214 A.2d 362, cert. denied, 384 U.S. 921, 86 S. Ct. 1372, 16 L. Ed. 2d 442." The assignment of error based on the inclusion in the charge of the reference to the frequency of the appearance of friends and associates of an accused as alibi witnesses clearly does not present a question of federal constitutional dimensions and hence does not involve a claim which is reviewable under the principle laid down in **O'Connor v. Ohio**, 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189, in the absence of either a request to charge or an exception to the charge.

The defendant's remaining assignment of error is predicated on a claim that the state's attorney introduced throughout the trial and in his summation to the jury "inflammatory material" and "prejudiced the jury by constant references to the seriousness of the LSD

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[1] "[Practice Book] Sec. 249. [REQUESTS TO CHARGE AND EXCEPTIONS — NECESSITY FOR The supreme court . . . shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of objection. Upon request, opportunity shall be given to present the exception out of the hearing of the jury."

problem." He claims that the trial court erred "[i]n allowing, refusing to strike and/or failing to give cautionary instructions as to the testimony elicited by the prosecutor and the arguments of the prosecutor" as stated in seven paragraphs of the finding. Four of these paragraphs concern the admission of evidence and three of them concern comments of the state's attorney during his arguments to the jury.

We consider first the claims of error relating to the admission of evidence. The police officers were asked whether they had observed the effects of LSD on people and the families of people using the drug. They both answered simply that they had. Neither officer testified as to what effects they had observed and the court sustained an objection to any inquiry beyond a simple answer of yes or no to the question of whether an observation had been made. There was clearly no error here. The defendant, on direct examination, testified that he had never used narcotics and that all he knew about LSD was what he had heard and read about it or had seen on television. On subsequent cross-examination he was asked what knowledge he had gleaned from these sources. The only objection to the line of inquiry was that it was improper because the defendant was not "an expert to testify." The court overruled this objection stating: "If he doesn't know, he can say he doesn't know. He realizes that." We find nothing erroneous in the court's ruling, particularly since the line of inquiry as to the extent of the defendant's knowledge of the drug was opened by the questions put to him on direct examination. See **Akers v. Singer**, 158 Conn. 29, 36, 255, A.2d 858; **Fahey v. Clark**, 125 Conn. 44, 47, 3 A.2d 313. The remaining assignment of error on the admission of evidence requires only the briefest mention. The state toxicologist, Abraham Stolman, testified as to what is an hallucinogenic drug and its effect on the human body. Not only did the defendant make no objection to the admission of the state toxicologist's testimony, but since the charges against the defendant involved the

possession and sale of a "controlled drug," and hallucinogenic substances are included in the statutory definition of that term[2] there is no merit to this assignment of error. In conclusion of our discussion of the assignments of error with respect to the admission of evidence it is pertinent to note that error is assigned not only to the "allowing" of the testimony but to the court's "refusing to strike and/or failing to give cautionary instructions as to the testimony elicited by the prosecutor." Since the same claim is made with respect to the argument of the prosecutor and will be discussed hereinafter, it suffices for the present discussion about evidence to note that the record discloses no request by the defendant that any of the testimony be stricken and no request whatsoever for any cautionary instructions.

The defendant's remaining claims of error concern remarks made by the state's attorney in the course of his closing argument to the jury with particular reference to his comments about the nature and seriousness of the offenses with which the defendant was charged and his comments that because the defendant chose to take his case to trial the usefulness of the two police officers as undercover narcotics agents was destroyed. The controlling factor in our consideration of these claims of error is that they were raised for the first time in this court by new counsel on the appeal and that no objection whatsoever was raised in the trial court, nor was the trial court alerted to any dissatisfaction or claim on the part of the defendant at a time when by proper objection or request for a corrective instruction by the court any error could have been corrected. "We have repeatedly reiterated that this court will not consider claimed errors on the part of the trial court unless there has been a compliance with the pro-

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[2]General Statutes § 19-450a.

visions of § 652 of the Practice Book."[3] **State v. Evans**, 165 Conn. 61, 67, A.2d , and cases cited therein; see also **State v. Johnson**, Conn. (35 Conn. L.J., No. 49, pp. 1, 3). Regardless of the failure of the defendant to make any objection to the argument of the state's attorney, it is pertinent to note that the latter's comments on the seriousness of drug trafficking were invited, if not induced, by the argument of defense counsel on the same subject in which he informed the jury that he anticipated that the state's attorney would in his closing argument discuss the seriousness of the problem. The comments of the state's attorney about the necessity for the police officers to "blow their cover" by testifying in the case would, taken alone, appear to be improper and wholly irrelevant to the issue of the guilt or innocence of the defendant. If they were in fact improper and irrelevant then, without a doubt, if the defendant had raised an objection at the time it would have been sustained and the jury cautioned to disregard the comments. In any event, there would be a record on which this court could properly review any ruling by the court in the context of all the evidence produced at the trial. It is too late to raise an objection for the first time on appeal when the trial court has not been called upon for a ruling and all opportunity for the trial court to give the jury a cautionary instruction has passed. "[T]he fact that counsel for the accused took no exception to the remarks of the State's Attorney, either at the time they were made or at the close of his argument, was a waiver of the right of the accused to now press this assignment of error. **State v. Frost**, 105 Conn. 326, 338, 135 Atl. 446." **State v. Kirschenbaum**, 109 Conn. 394, 409, 146 A. 837.

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[3] "[Practice Book] Sec. 652. ERRORS CONSIDERED This court shall not be bound to consider any errors on an appeal unless they are specifically assigned and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial."

As we observed in **State v. Evans**, supra, 70: "There appear, then, to exist only two situations that may constitute 'exceptional circumstances' such that newly raised claims can and will be considered by this court. The first is the **Vars** [**State v. Vars**, 154 Conn. 255, 224 A.2d 744] situation, where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal. This exception is reasonable because a claim not raised is deemed waived, and a litigant should not be held to have waived an unknown right. **O'Connor v. Ohio**, 385 U.S. 92, 87 S. Ct. 252, 17 L. Ed. 2d 189. The second 'exceptional circumstance' may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." The record in the case before us does not disclose that the defendant has established the existence of either of the two "exceptional circumstances" that would justify our consideration of claims not raised at the trial level.

There is no error.

In this opinion Shapiro, Loiselle and Ma[illegible]onald, Js., concurred.

BOGDANSKI, J. (dissenting). I cannot agree with the conclusion of the majority that the defendant waived his right to challenge the improper comments made by the state's attorney. Those remarks brought highly prejudicial facts before the jury without any support in the evidence and deprived the defendant of his constitutional right to a fair trial. Compliance with § 652 of the Practice Book is not required "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." **State v. Evans**, 165 Conn. 61, 70, A.2d. The record in this case amply supports such a claim. Furthermore, this court has stated that a new trial may be granted in cases of "flagrantly improper" comment by the state's attorney, notwithstanding the defendant's failure to call the trial court's attention to

the objectionable remark. **State v. Frost**, 105 Conn. 326, 338, 135 A. 446; **State v. Washelesky**, 81 Conn. 22, 28, 70 A. 62; **State v. Laudano**, 74 Conn. 638, 645, 51 A. 860.

Prosecutors cannot infringe upon constitutionally protected rights of an accused by conduct during the course of the trial. Where that has been done, the courts have not hesitated to reverse convictions. See, e.g., **Griffin v. California**, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, rehearing denied, 381, U.S. 957, 85 S. Ct. 1797, 14 L. Ed. 2d 730 (comment by the prosecutor on the accused's silence); **United States v. Wright**, 489 F.2d 1181 (D.C. Cir.) (comment by the prosecutor on the defendant's character as evidenced by his courtroom behavior); **Racine v. State**, 290 Ala. 225, 275 So. 2d 655 (comments by the prosecutor with no support in the record suggesting that the defendant had sold drugs to children and that he had committed numerous other crimes); **State v. McClure**, 504 S.W.2d 664 (Mo. App.) (prosecutor's reference to the defendant's military status and statement that the defendant was running away from his responsibility to his country, which comments were totally irrelevant to the crime charged); **Commonwealth v. Lipscomb**, Pa., 317 A.2d 205 (prosecutor's argument that the dead victim would be his best witness, recital of what that testimony would have been, and characterization of the defendant as a "hoodlum" and an "animal"); **Lopez v. State**, 500 S.W. 2d 844 (Tex. Crim. App.) (comments by the prosecutor that he was "concerned about the open season on police officers" and that the defendants were lying when they entered their pleas of not guilty).

A prosecutor is not an ordinary advocate. His duty is to see that justice is done and to refrain from improper methods calculated to produce prejudice and wrongful decisions by the jury. **Berger v. United States**, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314; **United States v. Kravitz**, 281 F.2d 581, 587 (3d Cir.). In **State**

v. Ferrone, 96 Conn. 160, 168-69, 113 A. 452, this court said regarding the duties of the prosecutor: "The case before us is a criminal case, and the counsel whose statements are in question is the State's Attorney. He is not only an officer of the court . . . but is also a high public officer, representing the people of the State, who seek impartial justice for the guilty as much as for the innocent. . . . By reason of his office, he usually exercises great influence upon jurors. His conduct and language in the trial of cases in which human life or liberty are at stake should be forceful, but fair, because he represents the public interest, which demands no victim and asks no conviction through the aid of passion, prejudice, or resentment. If the accused be guilty, he should none the less be convicted only after a fair trial, conducted strictly according to the sound and well-established rules which the laws prescribe. While the privilege of counsel in addressing the jury should not be too closely narrowed or unduly hampered, it must never be used as a license to state, or to comment upon, or to suggest an inference from, facts not in evidence, or to present matters which the jury have no right to consider. **Worden v. Gore-Meenan Co.**, 83 Conn. 642, 652, 78 Atl. 442 . . . . This law was not observed and enforced in this case. Because it was not, the accused has not had an impartial trial. Therefore the verdict must be set aside."

The record in this case discloses that the state's attorney made the following statements to the jury during his summation: "The police officers have testified here before you. **They have blown their cover**. They come in here and identify before you, two excellent trained investigators, undercover men who, you heard their testimony, purchased over a hundred various items of heroin, LSD and other controlled drugs. They have come in and we have lost them as undercover men **due to this case**, but we put them on here as witnesses before you, because this LSD problem and the sale of it is such a serious offense. . . . . They go around with a beard

and attempt to buy these drugs, and they succeeded. **But something went wrong with Mr. Malley this time** because these men came into court **and testified before you**, ladies and gentlemen of the jury. . . . Now, with respect to this drug scene, there are few people fighting it and a few of them are the two that testified here. There aren't many others, and we have **lost them due to this trial.**" (Emphasis added.)

These comments by the prosecutor were totally gratuitous and uncalled for. There was no evidence that the undercover agents were prevented from working in other geographic areas. There was no evidence that the disclosure of their names would affect their ability to continue as undercover agents. The effect of these comments was to prejudice the jury against the defendant for exercising his constitutional rights to a trial by jury and to confront the witnesses against him. U.S. Const. amend. VI; Conn. Const. art. 1 § 8. The state's attorney's account why the officers were put on the stand was misleading. They testified not for the reasons given by the state's attorney, but because the defendant had a right to confront his accusers. The comment that the state lost them due to this trial was wholly unwarranted. Moreover, the comment that "something went wrong with Mr. Malley this time" could only lead the jury to speculate that past criminal conduct on his part had gone unpunished.

The state's attorney commented further: "This question of the use of these psychedelic or hallucinogenic drugs has inflamed our country and has put many of us to asking questions about the use of this drug by our young people." "We often hear the expression the drug scene. And when we think of the drug scene, we think of what we see on television, what we hear about, the group in Greenwich Village, young people dressed in hippie style using marijuana, LSD, speed, some one of these other drugs who turn on, but that is not the drug scene as we see it."

Again, these comments had no basis in the evidence and had no business in the case.

In passing, it should be noted that a major issue in the case was the defendant's alibi and that the jury deliberated for some time before returning their verdict of guilty. This was not a case where overwhelming evidence of guilt would permit a conclusion that the prejudicial comments were but harmless error. See, e.g., **United States v. Bivona**, 487 F.2d 443 (2d Cir.); **People v. Parker**, 15 Ill. App. 3d 774, 305 N.E.2d 228; **State v. Tillem**, 127 N.J. Super. 421, 317 A.2d 738.

In my view, the defendant was penalized for exercising his right to a jury trial and his right to confront the witnesses against him. He was thus deprived of his fundamental right to receive a fair and impartial trial.

I would find error, set aside the verdict and order a new trial.

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT:

The Petitioner Edward Malley, Jr. respectfully represents:

1. That he is a citizen of the United States of America and of the State of Connecticut.

2. That he was charged by information dated August 31, 1970 in the Superior Court for the County of New Haven at Waterbury with one count of possessing a controlled drug (L.S.D.) (§ 19-481b of the Connecticut General Statutes) and two counts of selling a controlled drug (L.S.D.) (§ 19-480b of the Connecticut General Statutes) and filed as docket number 10,424 in said court.

3. Petitioner on September 17, 1970 entered a plea of not guilty and on November 18, 1970 a trial to a jury began.

4. On November 24, 1970, after deliberating approximately 12-½ hours, said jury returned a verdict of Guilty on Counts One and Two and Not Guilty on Count Three.

5. On December 15, 1970 the said Superior Court sentenced defendant to the custody of the Commissioner of Corrections for a term of not less than one (1) year nor more than two (2) years on the second count of said information and for a term of one (1) year on the first count with the execution of the sentence on the first count suspended (App. 12)

6. Petitioner within time provided by law, appealed from the aforesaid judgment to the Supreme Court of the State of Connecticut.

7. Said appeal to the Supreme Court was docketed as No. 7130.

8. Said appeal was heard by the Supreme Court and on December 16, 1974, by memorandum decision (one justice dissenting) affirmed the judgment below.

9. Said memorandum decision appeared in the Connecticut Law Journal, Vol. XXXVI, No. 25 (December 17, 1974) and is attached hereto in the Appendix (App. 1-6)

10. Petitioner is presently on bail and awaiting, without knowing when, the order of the Supreme Court to commence the sentence stated in paragraph 5 **supra**.

11. On appeal to the Supreme Court, petitioner assigned seven (7) assignments of error which appear at length in the appendix attached hereto (App. 27-28)

12. Petitioner is restrained and threatened with imprisonment pursuant to a sentence that is illegal and void in that petitioner was denied due process of law as guaranteed by the Fifth, Fourteenth and Sixth Amendments to the United States Constitution in that:

1. Petitioner's constitutional right to a fair trial was violated by the direct ex-

amination, cross-examination and summation of the prosecutor (App. 20-39) insofar as matters highly prejudicial neither relevant nor material to the prosecution and wholly outside the record were brought to the attention of the jury.

2. The prosecutor's actions infringing upon the constitutionally protected rights of petitioner prejudiced the jury against petitioner for exercising his constitutional rights to a trial by jury and to confront the witnesses against him.

3. Petitioner's right to adequate representation at trial was violated by failure of his counsel to object to the prosecutor's conduct during direct examination, cross-examination and summation thereby not providing the basis of appellate review under §652 of the Practice Book.

4. Petitioner's right to a fair trial was violated by the Supreme Court's refusal, §652 of the Practice Book notwithstanding, to reach and decide petitioner's constitutional claims duly appealed.

13. Petitioner, who testified at his trial, has, at all times mentioned herein, maintained his innocence of said crimes and has, post-conviction, successfully passed a polygraph test the results of which are attached hereto (App. 30-32)

14. Petitioner has not filed any other petitions in the State or Federal Courts for relief from this conviction.

Wherefore, petitioner prays:

1. That a writ of habeas corpus be directed to the respondents issued on his behalf.

2. That respondents be required to appeal and answer to the allegations of this petition.

3. That after full and complete hearing this Court relieve petitioner of the unconstitutional conviction and threatened imprisonment.

4. That respondents be ordered to stay the execution of the petitioner set out above and refrain from otherwise taking any action or proceeding against petitioner pending final determination of this petition.

5. That the Court grant such other, further and different relief as to the Court may seem just and proper under the circumstances.

(L.S.)

EDWARD MALLEY, JR.
Petitioner

STATE OF CONNECTICUT :
COUNTY OF HARTFORD : ss. December 27,1974

I, Edward Malley, Jr., being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

EDWARD MALLEY, JR.

Subscribed and sworn to before me this 27th day of December, 1974.

Commissioner of Superior Court
(Thomas D. Clifford)

APPENDIX OMITTED

RETURN OF RESPONDENT-APPELLANT TO PETITION FOR WRIT OF HABEAS CORPUS.

1. The Respondents admit the allegations of paragraphs 1, 2, 3, 5, 6, 7, 8, 9 and 14 of the petition.

2. The Respondents answer the allegations of paragraph 4 of the petition as follows:

(a) The jury's return of a not guilty verdict on the third count of the information was pursuant to the directive of the trial court;

(i) the trial court's direction of a not guilty verdict on the third count is shown by the printed record of the Connecticut Supreme Court (pars. 120, 121, 141, 142, 148-152, pp. 26, 32, 33) submitted as Exhibit 1 to this Return. It is also shown in that portion of the printed record which has been attached as an appendix to the petition at App. p. 20.

(b) The continuity and length of the jury's deliberations as shown by the docket sheets of the Superior Court submitted as Exhibit 2 to this return were as follows:

(i) on November 23, 1970, the court finished instructing the jury at 3:45 p.m. and thereafter the jury commenced their deliberations until 5:25 p.m. at which time they adjourned until the next day.

(ii) on November 24, 1970, the jury's deliberations commenced at 10:45 p.m. and they returned their verdicts at 5:40 p.m.

3. The Respondents answer the allegations of paragraph 10 of the petition as follows:

(a) After the Connecticut Supreme Court affirmed the judgment against the Petitioner, a mittimus ordering his confinement to the Connecticut Correctional Institution at Somers, pursuant to said judgment, was issued by the Superior Court and the Petitioner was so confined until his release on bail was ordered by this court.

4. The Respondents answer the allegations of paragraph 11 of the petition as follows:

(a) It is admitted that the Petitioner originally assigned seven (7) assignments of error on his appeal to the Connecticut Supreme Court as shown in the printed record of that court (Exhibit 1 pp. 40, 41) and in that portion of the printed record shown on App. pp. 27, 28 of the petition.

(b) The Petitioner abandoned his fifth and sixth assignments of error in his brief to the Connecticut Supreme Court as shown on page 14 of said brief, submitted as Exhibit 3 to this Return, and consequently these two assignments of error are not discussed in the State's brief submitted as Exhibit 4 to this Return. The abandonment of the two assignments of error is noted in the opinion of the Connecticut Supreme Court at App. p. 1 of the petition.

5. The Respondents deny the allegations of paragraph 12 of the petition and the specifications of said allegations set forth in sub-paragraphs 12 (1) (2) (3) and (4).

6. The Respondents answer the allegations of paragraph 13 in the following manner:

(a) The existence of the Petitioner's post conviction polygraph test and the existence of the report made by the test examiner to the attorney who represented him on his appeal to the Connecticut Supreme Court is admitted.

(b) The admissibility into evidence of polygraph test results, even if such had been offered at the Petitioner's trial is doubtful and in any event, receipt of such results as evidence is not a constitutional requirement for a fair trial.

(c) The submission to this court of post-conviction polygraph test results as a method of impugning the jury's verdicts is improper and should not be considered by this court as any basis for habeas corpus relief.

7. In addition to the foregoing exhibits, the Respondents also submit the following exhibits as a part of this Return:

(a) Exhibit 5 - Transcript dated November 19, 1970 in the case of **The State of Connecticut vs. Edward Malley, Jr.**, No. 10,424 which transcript contains the entire testimony at the first day of the trial.

(b) Exhibit 6 - Transcript dated Monday, November 23, 1970, in the case of **The State of Connecticut vs. Edward Malley, Jr.**, No. 10.424 which transcript contains the entire testimony at the second and final day of testimony at the state trial.

(c) Exhibit 7 - Transcript of the argument of counsel before the jury on Mon-

day, November 23, 1970, in the case of **The State of Connecticut vs. Edward Malley, Jr.**, No. 10,424.

(d) Exhibit 8 - The complete instructions given by the trial judge to the jury on Monday, November 23, 1970 in the case of **The State of Connecticut vs. Edward Malley, Jr.**, No. 10,424.

BY WAY OF AFFIRMATIVE DEFENSE

1. The Petitioner has failed to exhaust state remedies with respect to his present claim of inadequacy of counsel at his state trial, as set forth in paragraph 12 of the petition, in that this claim has never been presented to the state courts despite the fact that Petitioner was represented by different counsel on his direct appeal.

2. The failure of the Petitioner's trial counsel, whose competency has never been questioned in the state proceedings, to object either to the state prosecutor's examination of witnesses or to his comments made in closing argument constituted a waiver of these claims in view of the contexts in which the questions of the witnesses were asked and the comments in argument were made.

3. If the Petitioner intends to have his polygraph test results considered as evidence to show that the verdicts rendered against him were not those of an impartial jury, he is required first to make such a collateral attack on his state judgments in the state courts where the remedy of habeas corpus is available to him.

THE STATE OF CONNECTICUT AND
JOHN MANSON, COMMISSIONER OF
CORRECTION, RESPONDENTS

BY _____
JERROLD H. BARNETT, ESQ.
ASSISTANT STATE'S ATTORNEY

CERTIFICATION

This is to certify that a copy of the within and foregoing Return and copies of all exhibits were mailed to Thomas D. Clifford, Esquire, Chief Federal Public Defender, 770 Chapel Street, New Haven, Connecticut 06510 on the 18th day of February, 1975.

JERROLD H. BARNETT, ESQUIRE

MEMORANDUM OF DECISION ON PETITION FOR A WRIT OF HABEAS CORPUS

I.

On November 24, 1970, the petitioner was convicted by a jury of one count of possessing a controlled drug (LSD), [1/] and one count of selling the same drug.[2/] On December 15, 1970, the trial court denied his motion to set aside the verdict and entered judgment. Four years later the Connecticut Supreme Court affirmed the conviction, over the strong dissent of Justice Bogdanski.[3/] **State v. Malley**, 167 Conn. 379, —A.2d— (1974). In this petition he challenges the constitutionality of his conviction and seeks a writ of habeas corpus. Jurisdiction exists under 28 U.S.C. §§ 2241 and 2254.

[1/] In violation of Conn. Gen. Stat. Ann. § 19-481(b) (1969).

[2/] In violation of Conn. Gen. Stat. Ann § 19-480(b) (1969).

[3/] The four-year delay was not unusual. **See Ralls v. Manson**, 375 F. Supp. 1271 (D. Conn.), **rev'd**. 503 F.2d 491 (2d Cir. 1974). Fortunately for Mr. Malley, he was released on bond pending the outcome of the appeal process. He has remained free on bond pending the decision on this petition.

I. Facts

The State's case was composed mainly of the testimony of two undercover agents, who testified that they had been approached by the petitioner, and that he offered to sell them some LSD. They testified that a short time later the sale was consummated, and that the substance, upon analysis, was conclusively identified as LSD.

The petitioner denied ever having seen the officers before, and presented evidence that he could not have been at the site of the sale at the time the officers stated it occurred. This alibi evidence consisted of the testimony of employees of a stereo store and an insurance agency, neither of whom were related to or acquainted with the petitioner, that he was present in one and then the other place of business at the times in question. The employee of the insurance agency was able to fix the time with some accuracy due to a specific phone call which he received while the petitioner was present.

The question for the jury, then, was essentially one of credibility. After seven hours of deliberation, and after having the testimony of one of the officers and the insurance company employee read to them, the jury determined the credibility issue against the petitioner and returned its verdict.

II. Petitioner's Claim

The chief claim presented by the petitioner is that the conduct of the prosecutor throughout the trial, but especially in his closing argument to the jury, was so prejudicial as to have denied him a fair trial in violation of the due process clause of the fourteenth amendment. Additionally, petitioner claims that the prosecutor's references to irrelevant and inflammatory material in his rebuttal argument placed an impermissible burden on his exercise of his right to confront the witnesses against him.

Unfortunately, in order to convey the complete flavor of the argument employed by the prosecutor, it is necessary to quote at length from his rebuttal:

> "Ladies and Gentlemen of the Jury:
>
> "The basic issue I submit in this case is whether you believe the police officers or whether you believe this accused, Mr. Malley. The police officers have testified here before you. They have blown their cover. They come in here and testify before you, two excellent trained investigators, undercover men who, you heard their testimony, purchased over a hundred various items of heroin, LSD, and other controlled drugs. They have come in and we have lost them as undercover men due to this case, but we put them on here as witnesses before you, because this LSD problem and the sale of it is such a serious offene.
>
> * * *
>
> "This question of the use of these psychedelic or hallucinagenic [**sic**] drugs has inflamed our country and has put many of us to asking questions about the use of this drug by our young people.
>
> "We often hear the expression the drug scene. And when we think of the drug scene, we think of what we see on television, what we hear about, the group in Greenwich Village, young people dressed in hippie style using marijuana, LSD, speed, some one of these other drugs who turn on, but that is not the drug scene as we see it. That is not the drug scene as you have seen it here portrayed before you twelve people on this jury.

"What you have seen here is the sale of seven little tiny pills for $25, almost $3.60 apiece. That is a commercial business and it is designed to destroy the youth of our country and it is doing so. And it is carried on by men like Mr. Malley who sell indiscriminately, so indiscriminately that once in a while they make a mistake and they sell to two bearded, funny, easy to get along with fellows that drive around in an old car.

* * *

"Now with respect to this drug scene, there are few people fighting it and a few of them are the two that testified here. There aren't many others, and we have lost them due to this trial.

* * *

"Now, ladies and gentlemen of the jury, as Mr. Mellon says, you have a serious and solemn responsibility here to decide the guilt or innocence of this accused. You also have a serious responsibility to society for, as has been said many years ago, 'To let the guilty go free is to do thereafter with their hands all the crimes they may subsequently commit.'

"You ladies and gentlemen of the jury are aware of the problem in our society caused by drugs. This is your opportunity to return a verdict that reflects that concern. The State has submitted direct eyewitness evidence of police officers in respect to this man, and we respectfully suggest that the only verdict possible In [**sic**] this case is a verdict of guilty.

"Thank you."[4/]

[4/]Respondents' Ex. 7, at 25-27, 28, 31.

This argument built upon and was preceded by several incidents in which the prosecutor had attempted to explore the effect of LSD on users of the drug, especially minors.[5]

The question for this court is whether, by employing these arguments, the prosecutor effectively denied the petitioner his constitutional right to a fair trial.

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[5]An example of this earlier questioning occurred while the petitioner himself was being cross-examined.

"Q: And you told [your attorney] and told this jury that all you know about LSD is what you heard about it and seen on television?

"A: Right.

"Q: What you have read about it and seen on television?

"A: Yes.

"Q: You know it is a dangerous drug?

"A: That is for sure.

"Q: You know that it can cause permanent damage to people that use it, don't you?

"A: I suppose it can. I wouldn't know. I never used it.

"Q: You have read or seen it on television, haven't you?

"A: Yes, I have.

"Q: It is a so-called psychedelic drug?

"A: Yes, it is, I imagine.

"Q: People have good or bad trips on it?

"MR. MELLON: I will object to this.

"MR. McDONALD: Mr. Mellon went into it.

"THE COURT: I will allow it.

[Footnote continued on following page.]

III. **Standard of Review**

At the outset, it is clear that both the questions asked by the prosecutor and his rebuttal argument, but especially the argument, transcended the bounds of propriety. Were this court exercising appellate review there is no question but that the prosecutor's inexcusable conduct would compel reversal. The Connecticut Supreme Court recognized as much when it stated that the prosecutor's comments were

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5/ cont'd.

"MR. MELLON: May an exception be noted?

"THE COURT: Yes.

"MR. MELLON: For this reason: I don't think he is an expert to testify.

"THE COURT: If he doesn't know, he can say he doesn't know. He realizes that.

BY MR. McDONALD:

"Q: You know that people can have bad trips on LSD. You have heard that.

"A: I have seen it on television.

"Q: And they can go off?

"A: I have read different articles about it, where something like that happened.

"Q: You wouldn't have anything to do with selling that to young people, would you?

"A: I wouldn't sell it to anybody.

"Q: You know it is deadly stuff, don't you?

"A: It sure is."

Respondents' Ex. 6, at 185-86.

"improper and wholly irrelevant to the issue of the guilt or innocence of the defendant." **State v. Malley**,

167 Conn. 379, 386, —A.2d —, — (1974.[6/] The standard of review which this court must apply is not, however, that of reversible error.

It is established that misconduct on the part of the prosecutor can rise to the level of a constitutional deprivation. **Donnelly v. DeChristoforo**, 416 U.S. 637 (1974). In deciding whether the prosecutor's conduct during the course of this trial is a sufficient ground to support the issuance of a writ of habeas corpus, this court must determine if that conduct created "a situation so prejudicial to [the petitioner] that he was denied a fair trial within the meaning of the due process clause of the Fourteenth Amendment." **United States ex rel. Castillo v. Fay**, 350 F.2d 400, 401 (2d Cir. 1965), **cert. denied**, 382 U.S. 1019 (1966). The Supreme Court has cautioned that the proper standard of review in this type of case is

> " 'the narrow one of due process, and not the broad exercise of supervisory power that [it] would possess in regard to [its] own trial court.' We regard this observation as important for not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a 'failure to observe that fundamental fairness essential to the very conduct of justice.' **Lisenba v. California**, 314 U.S. 219, 236 (1941)."

Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1974).

[6/]The court refused to rule on the issue however as there had been no contemporaneous objection at the trial. See Part IV, **infra.**

This is not, however, a case, as was **Donnelly**, of one ambiguous comment made during the course of a long trial. Rather, the transcript discloses an effort on the

part of the prosecutor to inflame the prejudices of the jury at every possible opportunity by: 1) introducing extraneous and irrelevant evidence concerning the effects of drugs on users, especially minors, and their families; 2) intimating, without any evidentiary support, that the petitioner had been involved in a number of earlier drug transactions for which he had not been brought to justice; 3) inveighing against the "drug culture" and implying, again without evidentiary support, that the petitioner was in some way connected with it; and 4) attempting to bolster the agents' credibility with the unsupported assertion that the State had considered the case important enough to "sacrifice" the future ability of the agents to operate by "blowing their cover" and having them testify at the trial.

The prejudicial effect of linking a defendant to a plot to sell drugs to minors is self-evident. In **United States v. Bugros**, 304 F.2d 177 (2d Cir. 1962), the Second Circuit reversed a conviction because the prosecutor had raised the implication that the defendant had hidden narcotics where a child could easily have discovered them. In this case, however, the prosecutor went even further, stating that:

> "What you have seen here is the sale of seven little tiny pills . . . . That is a commercial business and it is designed to destroy the youth of our country and it is doing so. And it is carried on by men like Mr. Malley who sell indiscriminately . . . ." [7/]

The prosecutor further prejudiced the case against the petitioner by implying that he had participated in previous sales of drugs, but had escaped punishment. In addition to the above quotation, which seemingly linked the petitioner to a broad conspiracy, the prosecutor continued:

[7/]Respondents' Ex. 7, at 26.

> "But something went wrong with Mr. Malley this time because these men [the agents] came into Court and testified before you ladies and gentlemen of the jury . . . ." [8]

The combined effect of these two statements is clearly to imply to the jury that the prosecutor had personal knowledge of earlier transactions in which the petitioner had been involved, even though no such evidence had been introduced at trial.

The prosecutor went further and raised the spectre of "the drug scene," composed of "the group in Greenwich Village, young people dressed in hippie style using marijuana, LSD, speed, some one of these other drugs who turn on . . . ."[9] While he told the jury that that was not "the drug scene" as it had been portrayed to

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[8] **Id.** at 27.

[9] **Id.** at 26.

them,, he described the drug scene as they had seen it as a commercial business "designed to destroy the youth of our country." He then stated that two of the "few people" who were fighting against the drug scene (lumping the two "scenes" together) had been "lost" due to the trial. He finally invited the jury to return a verdict which reflected their concern with "the problem in our society caused by drugs." The obvious purpose of these remarks was to tell the jury that they could in some way strike out at "the drug scene" or stamp out "the drug problem" by convicting the petitioner. This tactic of associating a defendant with an unpopular or feared group and then inviting the jury to convict him as an exhibition of their feelings toward the group has moved courts in several instances to set aside the resulting verdicts. **United States ex rel. Haynes v. McKendrick**, 481 F.2d 152 (2d Cir. 1973) (appeal-

ing to racial prejudice); **Perry v. Mulligan**, 399 F. Supp. 1285 (D.N.J. 1975) (trial is of "all corrupt officials").

Such tactics violate the standards adopted by the American Bar Association Project on Standards for Criminal Justice, which state:

> "5.8(c) The prosecutor should not use arguments calculated to inflame the passions or prejudice of the jury.
>
> "5.8(d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the prevailing law, or by making predictions of the consequences of the jury's verdict."

Standards Relating to the Prosecution Function and the Defense Function, Approved Draft (1971). Furthermore, they suggest a conscious attempt to prejudice the jury. In the opinion of this court the prosecutor's numerous remarks deprived the petitioner of a fair trial.

The prosecutor placed even a greater burden on the petitioner, however, by arguing to the jury that the State had in some way sacrificed the utility of the two undercover agents, and that they had been "lost" to the fight against "the drug scene." He argued that:

> "They have come in and we have lost them as undercover men due to this case, but we put them on here as witnesses before you, because this LSD problem and the sale of it is such a serious offense."[10/]

[10/] **Id.** at 25.

The effect of this statement, which was repeated later in the argument, could only have been to further prejudice the jury against the petitioner, and to place an unfair burden upon his constitutional right to confront the witnesses against him. **U.S. Const.** amend. VI This conduct was exacerbated by the absence of any evidence in the record to support such a statement. As Justice Bogdanski pointed out in his dissent, there were other, equally likely, possibilities which the petitioner could have explored through cross-examination, had the prosecutor presented any evidence to support this assertion. **State v. Malley**, 167 Conn. 379, 391, —A. 2d— (1974).

While it is impossible to establish with certainty whether, but for the misconduct of the prosecutor, the jury would have returned a different verdict, it is possible to state that, on its merits, the case against the petitioner was a close one. The State's case consisted solely of the testimony of the two officers, and they disagreed on the critical issue of the time of the alleged sale, and were contradicted by their own report on their identification of the petitioner's automobile license number. On the other hand, the petitioner was able to marshal impressive evidence on his own behalf. This is, then, one of the habeas petitions which raise, in addition to legal claims, substantial questions as to the guilt or innocence of the petitioner.[11/] **See Kibbe**

[11/]The petitioner has apparently submitted the result of a polygraph examination as an exhibit. This court has not examined the report and it has therefore played no part in its consideration. **See United States ex rel. Sadowy v. Fay**, 284 F.2d 426 (2d Cir. 1960), **cert. denied**, 365 U.S. 850 (1961) ; **State v. Mitchell**, —Conn. —, —A.2d —, 37 Conn. L.J. No. 3, at 6, 8 (July 15, 1975) ; **State v. Carnegie**, 158 Conn. 264, 272, 259 A.2d 628, **cert. denied**, 396 U.S. 992 (1969). This decision is based solely upon the transcript of the state court proceedings.

v. Henderson, No. 75-2128 (2d Cir. Apr. 8, 1976); **Ralls v. Manson**, 503 F.2d 491, 494-99 (2d Cir. 1974) (Lumbard, J., concurring). The length of time the jury deliberated is only one indication of this.[12] In light of the seriousness of the misconduct, its repetition, and its likely effect on the jury, this court concludes that the petitioner was deprived of his right to a fair trial in violation of the due process clause of the fourteenth amendment.[13] **Cf. Donnelly v. DeChristoforo**, 416 U.S. 637 (1974).

IV. **Waiver**

A final difficulty is raised by the fact that the petitioner's attorney did not object to the prosecutor's closing argument.[14] It was because of this procedural

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[12] Compare the 12 hour total deliberation time in this case with the 15 hours held to be significant in the much more serious case of **Reilly v. State**, 32 Conn. Supp. 349, 361, —A.2d—, 37 Conn. L.J. No. 42, at 1A, 5A (Apr. 13, 1976).

[13] The State argues that the prosecutor's misconduct was invited by the followng statement made by the petitioner's attorney in his closing argument:

> "I say I don't want to minimize the fact that narcotics is a big, big problem, and I can be assured that as soon as I sit down, I can only anticipate what the State's Attorney is going to try and bring out."

Respondents' Ex. 7, at 23-24.

Rather than an invitation, this was an attempt to parry the prosecutor's continuous attempts to try "the drug problem" rather than the defendant. **See United States v. Rubinson**, No. 75-1197 (2d Cir. Apr. 8, 1976).

[14] The petitioner has also raised a claim of ineffective assistance of counsel. Since he admits that this claim has not been presented to the state courts, he has failed to meet the exhaustion requirement which has been interpreted into 28 U.S.C. § 2254. **Picard v. Connor**, 404 U.S. 270 (1971). This court therefore cannot consider this claim.

default that the Connecticut Supreme Court refused to consider the petitioner's claim on appeal.[15] The court did hold, however, that the claim did not fall into the exception to its contemporaneous objection rule permitting review of errors which have deprived the appellant of a constitutional right and a fair trial. **State v. Malley**, 167 Conn. 379, 387-88, —A.2d— (1974). **But see** Justice Bogdanski's dissent, 167 Conn. 388-92.[16]

The question for this court, then, is not one of exhaustion since the claim was presented to the Connecticut court, but whether the petitioner can be held to have deliberately by-passed his right to object to the prosecutor's conduct and to renew his objections on appeal if the trial judge ruled against him. **Fay v. Noia**, 372 U.S. 391, 433 (1963).[17]

[15]Connecticut Practice Book § 652 (1963). **Errors Considered**

> "This court shall not be bound to consider any errors on an appeal unless they are specifically assigned or claimed and unless it appears on the record that the question was distinctly raised at the trial and was ruled upon and decided by the court adversely to the appellant's claim, or that it arose subsequent to the trial."

[16]**Cf.**, although on direct review, **Norris v. Alabama**, 294 U.S. 587 (1935) and **Patterson v. Alabama**, 294 U.S. 600 (1935).

[17]The State's reliance on **Henry v. Mississippi**, 379 U.S. 443 (1965) is misplaced. The decision in **Henry** rested on a determination that the contemporaneous objection rule is an adequate and independent state-law ground of decision which precludes the Supreme Court's jurisdiction to directly review a state court decision. **See Fay v. Noia**, 372 U.S. at 429. Henry's state-court conviction was eventually set aside in a

The test of "deliberate by-pass" remains that set out in **Fay**, 372 U.S. at 439:

> "The classic definition of waiver enunciated in **Johnson v. Zerbst**, 304 U.S. 458, 464 - - 'an intentional relinquishment or abandonment of a known right or privilege' - - furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits . . . ."

In record in this case, of course, shows no consultation between the petitioner and his counsel before the failure to object, or even a conscious decision on the part of either. And while it is true that some decisions in the heat of trial have to be made without prior consultation, it is inconceivable that any individual, having chosen to go to trial, could elect to waive his right to a fair one. **Cf. United States ex rel. Bruno v. Herold**, 408 F.2d 125 (2d Cir. 1969), **cert. denied**, 397 U.S. 957 (1970).[18/]

[17/] cont'd.

federal habeas proceeding. **Henry v. Williams**, 299 F. Supp. 36 (N.D. Miss. 1969). **United States ex rel. Bruno v. Herold**, 408 F.2d 125 (2d Cir. 1969), **cert. denied**, 397 U.S. 957 (1970), is also distinguishable, since that decision was premised upon a finding that the petitioner was not deprived of a fair trial.

[18/]The two recent Supreme Court opinions, **Estelle v. Williams**, 44 U.S.L.W. 4609 (U.S. May 3, 1976) and **Francis v. Henderson,**

But in this case it is, in fact, unnecessary to rely solely on a holding that there was no deliberate by-pass, since the Connecticut Supreme Court did in fact address the petitioner's constitutional claims on the merits, at least to the extent that they are reviewable in this court.

As I stated above, the Connecticut Supreme Court recognizes two exceptions to its contemporaneous objection rule. The first is not relevant here. In passing on the second, the court held:

> " 'The second "exceptional circumstance" may arise where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial.' The **record** in the case before us does not disclose that the defendant has established the existence of either of the two 'exceptional circumstances' that would justify our consideration of claims not raised at the trial level."

State v. Malley 167 Conn. 379, 387-88, —A.2d— (1974).

Since the standard for the second "exceptional circumstance" is substantially identical to the standard this court has exercised in reviewing the prosecutorial miconduct, the State cannot now assert that the petitioner has waived this constitutional claim. **Warden v. Hayden**, 387 U.S. 294, 297 n.3 (1967).

18/ cont'd.

44 U.S.L.W. 4620 (U.S. May 3, 1976), do not require a different result. In **Francis** the Court held that statutory construction and comity considerations required the conclusion that Congress did not intend to include tardy challenges to the makeup of jury panels within the scope of § 2254. **Estelle** resulted from a determination that a defendant's failure to object to being tried in prison garb precludes the finding of compulsion necessary to constitute a constitutional deprivation. Neither case claimed to overrule **Fay v. Noia**.

V. Conclusion

This court concludes that the repeated instances of prosecutorial misconduct, in which the prosecutor linked the defendant to unproven drug sales to minors, attempted to inflame the jury regarding the nature of the crime charged, and attempted to prejudice the jury against the petitioner because he chose to confront the witnesses against him, combined to deny the petitioner a fair trial, in violation of the due process clause of the fourteenth amendment. Accordingly the petition for a writ of habeas corpus will be granted unless the State elects to vacate the petitioner's conviction and retry him within sixty (60) days.

SO ORDERED.

Dated at Hartford, Connecticut, this 15th day of June, 1976.

M. Joseph Blumenfeld
United States District Judge